No. 75-750

In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD F. CALVERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 523 F.2d 895.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 1975 (Pet. App. B). A timely petition for rehearing, with suggestion for rehearing

en banc, was denied on September 24, 1975 (Pet. App. C). On October 15, 1975, Mr. Justice Blackmun extended the time within which to file a petition for a writ of certiorari to November 24, 1975. The petition was filed on November 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Department of Justice attorney who presented the case to the grand jury lacked proper authorization to appear before that body, thus rendering the resulting indictment invalid.

2. Whether the prosecution failed to disclose subsistence payments it had made to a government witness who had been relocated to protect him.

3. Whether the mailings and use of the wires were sufficiently related to the fraudulent scheme to bring petitioner's conduct within the statutes, and if they were, whether the court erred by refusing to give petitioner's proposed instruction regarding the required nexus between the mailings and use of wires and the scheme.

4. Whether evidence of prior crimes and activities of petitioner suggesting criminality was improperly admitted.

5. Whether certain hearsay testimony should have been excluded.

6. Whether publicity occurring before and during trial deprived petitioner of a fair trial.

7. Whether the sentence was excessive.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on seven counts of mail fraud (18 U.S.C. 1341), four counts of fraud by wire (18 U.S.C. 1343), and one count of conspiring to commit mail and wire fraud (18 U.S.C. 371). He was sentenced to nine consecutive terms of five years imprisonment (Tr. 2230-2234).[1] The court of appeals affirmed in a thorough opinion on which, in large measure, we rely (Pet. App. A).

In the spring of 1972, petitioner asked an old acquaintance, Charles Hintz, if he were interested in going "into business" with him (Hintz Tr. 4, 11-13).[2] In a series of meetings, petitioner informed Hintz that he wished to use him as a "front man" in a scheme that worked in the following way. Petitioner and Hintz would enter into a partnership with a businessman who had an idea or an invention; they would obtain key man and accidental death insurance on the businessman and then cause his death for the purpose of collecting and sharing the pro-

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[1] Three other five-year prison terms were made concurrent with the nine consecutive five-year terms.

[2] References to nine consecutively paginated trial transcript volumes will be designated "Tr." followed by the appropriate page. References to separately paginated trial transcript volumes will be prefaced by the name "Alsop," "Null," or "Hintz" to indicate the witness whose testimony is contained in the volume. Exhibits will be referred to by indicating the party who offered them in evidence, followed by "Exh." and the appropriate number.

ceeds of the insurance policies. (Hintz Tr. 12-13, 18-21). Petitioner informed Hintz that he needed a "front man" because he had successfully used this scheme before and, hence, could not have his name listed as beneficiary on the policies (Hintz Tr. 21).

Hintz accompanied petitioner to several meetings with at least three potential business partners (Hintz Tr. 23-32, 33-34). During the process of sizing up these prospects, petitioner stressed to Hintz that the health and insurability of the potential partner was more important than was his business acumen or the merits of his idea or invention (Hintz Tr. 31-32). By late spring of 1972, Hintz dropped out of the picture as a "front man." [3]

As a result of petitioner's efforts, petitioner's father, James Calvert, entered into a partnership agreement with Victor Null, an inventor who had designed a rotary engine and who was looking for financial backing. Under the partnership agreement, James Calvert was to supply the necessary funds and Null was to develop the engine (Tr. 40-47; Gov't. Exh. 34). The partnership leased office space in East St. Louis, and Null began work there on a prototype (Tr. 902-905, 912-915; Gov't. Exh. 35).

During the next few months, petitioner obtained insurance policies on the life of Null with a total face value in excess of two million dollars. James Calvert became the beneficiary on two policies, worth

[3] In August of 1972, Hintz informed law enforcement officials that he believed petitioner was involved in a scheme to defraud insurance companies (Hintz Tr. 184; Ct. Exhs. 56, 58).

$350,000 in the event of accidental death; the premiums came from petitioner's funds. An additional $2,000,000 policy was owned by the partnership and designated the partnership as beneficiary (Pet. App. A-2 to A-3 and n. 2).

The various dealings with several insurance companies to obtain the Null insurance policies were the bases for ten of the mail and wire fraud counts of the indictment. Among these were numerous applications and dealings with Prudential Insurance Company for coverage on Null's life,[4] similar dealings with New England Mutual from which a policy on Null's life was obtained, and successful dealings with Bowes & Company and Lloyd's of London for a $2,000,000 policy on Null, with the partnership as the beneficiary.[5]

On November 1, 1972, petitioner went to the home of an acquaintance of 25 years, John Alsop, and offered him $5,000 if he would murder an inventor in East St. Louis. He told Alsop that the inventor's wife wanted some "policies" cancelled and that he wanted the inventor killed in the near future, dur-

[4] No policy was actually obtained from Prudential.

[5] See Tr. 101-106; Gov't. Exh. 1; Tr. 106-110, 259; Gov't. Exhs. 1B, 1C; Tr. 111-116, 231-232, 1042-1043, 1097-1099, 1107; Gov't. Exhs. 4, 6, 94, 107, 108; Tr. 133-136, 370-385, 425, 495-497; Gov't. Exh. 20; 1086, 1099-1102, 1105; Gov't. Exhs. 97, 49, 102; Tr. 386-387; Gov't. Exh. 21; Tr. 386-394, 509-511; Gov't. Exhs. 21, 24, 25; Tr. 394, 395-397, 509-511; Gov't. Exhs. 25, 33; Tr. 1141-1152; Gov't. Exh. 118; Tr. 1161-1163, 1249; Gov't. Exh. 119; Tr. 927-929, 931-935; Gov't. Exhs. 68, 69, 70, 71; Tr. 934, 937-938; Gov't. Exhs. 72, 125; Tr. 939-940; Gov't. Exhs. 73, 126.

ing a time when petitioner would be in Florida. Petitioner wanted Alsop to go to the inventor's East St. Louis office early one morning and shoot the inventor in the head several times with a .22 or .25 caliber pistol (Alsop Tr. 149, 156-158).

When Alsop balked, petitioner asked him to think it over (Tr. 160, 162). The next day petitioner called from the partnership premises in Illinois to Alsop's residence in Missouri and asked Alsop if he had made up his mind.[6] Alsop again declined the offer (Alsop Tr. 166).

On November 9, 1972, two days after petitioner had gone to Florida (Tr. 1852), Null's body was found in his East St. Louis workshop (Tr. 1450-1455). He had been shot four times in the head with a .22 caliber firearm (Tr. 1402-1408). There were no signs of forced entry, and nothing was reported missing, although the office had the appearance of having been ransacked (Tr. 1393, 1408-1410, 1417-1418, 1454, 1462; Gov't. Exhs. 135-139). The murderer has never been found.

Shortly after the murder, petitioner told Hintz to warn Alsop to keep his mouth shut, if he did not wish to see his (Alsop's) daughter harmed (Hintz Tr. 49). Subsequently, petitioner offered to give Hintz $100,000 tax-free "from our policy" if he

[6] This interstate telephone call was the basis of Count 11 of the indictment. Telephone company records were introduced to establish that a call had been placed by an unknown party from the East St. Louis partnership office to Alsop's home in the early afternoon of November 2, 1972 (Alsop Tr. 164-166; Gov't. Exh. 133).

would corroborate petitioner's deposition testimony that Hintz had expressed an interest in acquiring Null's engine (Hintz Tr. 50-51).

ARGUMENT

1. Petitioner contends (Pet. 14-17) that the Department of Justice attorney who presented this case to the grand jury lacked proper authorization to appear before that body and that the resulting indictment was therefore invalid (Pet. 14).

Petitioner raised this contention for the first time more than six months after his conviction. The court of appeals properly concluded that, by not making this claim prior to trial, petitioner had waived his objection (Pet. App. A-5). See Fed. R. Crim. P. 12(b)(2); *Davis* v. *United States*, 411 U.S. 233, 236-237. The court of appeals also properly rejected petitioner's contention on the merits (Pet. App. A-5 to A-6). See 28 U.S.C. 515(a); *United States* v. *Wrigley*, 520 F.2d 362 (C.A. 8), certiorari denied, No. 75-5284, November 17, 1975; *United States* v. *Agrusa*, 520 F.2d 370 (C.A. 8); *DiGirlomo* v. *United States*, 520 F.2d 372 (C.A. 8); *In re Persico*, 522 F.2d 41 (C.A. 2); *In re DiBella*, 518 F.2d 955 (C.A. 2).[7]

[7] Our position on the merits is set forth in our memorandum in opposition in *Wrigley*, upon which we rely, and in the opinion of the court of appeals in *Wrigley*. See 520 F.2d 362. We are sending petitioner a copy of our memorandum in opposition in the *Wrigley* case.

2. Petitioner claims (Pet. 17-20) that the government deliberately concealed the fact of relocation payments made to Charles Hintz and that, as a result, petitioner could not successfully attack Hintz's credibility when he testified as a government witness at trial.

Prior to trial, Mr. and Mrs. Alsop and Mr. Hintz were relocated for their safety, pursuant to the witness relocation program. The day before Hintz was to testify, the government made him available to counsel for petitioner (Tr. 342, 471-474). The afternoon prior to Hintz's testimony the government informed petitioner that "no promises of immunity" had been made and that Hintz had received no benefits other than those normally "associated with witness protection" (Tr. 484). While defense counsel did not probe the area of benefits during his cross-examination of Hintz, he did reserve the right to recall him.

During his cross-examination of Mr. Alsop, defense counsel brought out the amount and duration of the payments Alsop had received under the witness relocation program (Alsop Tr. 194-196). Although he was aware that Hintz, like Alsop, had been relocated pursuant to that same program, defense counsel did not recall Hintz to the stand. However, in closing argument, he emphasized that "you can pretty well surmise that if they're paying John Alsop they're paying good old Charlie [Hintz] as well" (Tr. 2122).

There is no substance to petitioner's claim that the government misrepresented or concealed the fact of relocation payments to Hintz and thereby deprived him of the opportunity to attack Hintz's credibility. The record shows that petitioner was aware before Hintz testified that Hintz, like Alsop, had been relocated pursuant to the witness relocation program and had been advised that Hintz was receiving no benefits other than those normally "associated with witness protection" (Tr. 484). This representation was entirely accurate. Even if petitioner was then unaware that such relocation involves subsistence payments, this fact was brought to his attention during the subsequent testimony of Alsop, and he argued to the jury that Hintz was probably receiving relocation payments. In the circumstances presented here, the court of appeals correctly concluded (Pet. App. A-11) that there was no misrepresentation or nondisclosure by the government, and that petitioner suffered no prejudice.

3. Petitioner argues (Pet. 20-22) that it was error for the trial court not to have adopted his proposed instruction which would have required for conviction a finding that "the defendant must have contemplated the use of the mails or wire facilities" and that the use contemplated "must be an essential part of the alleged scheme" (Pet. 22).

The trial court properly rejected petitioner's proposed instruction because it was incorrect. As the court of appeals noted (Pet. App. A-26 to A-27), this Court announced the following standard governing

a defendant's connection with the use of the mails—which applies equally to the use of wire facilities—in *Pereira* v. *United States*, 347 U.S. 1, 8-9:

> [I]t is not necessary to show that petitioners actually mailed * * * anything themselves; it is sufficient if they caused it to be done. * * * [Nor is it] necessary that the scheme contemplate the use of the mails as an essential element. * * * Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

In the instant case, the evidence shows that petitioner knew that the use of the mails or wires would necessarily follow from his acts.[8] Moreover, since petitioner had been registered with the State of Missouri as a life insurance agent (Tr. 1276-1280; Gov't. Exh. 127), he could reasonably have foreseen that the numerous insurance applications, medical forms and responses by the insurance companies would be sent by mail or wire.[9]

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[8] See transcript pages and exhibits cited in note 5, *supra*, and accompanying text.

[9] Petitioner's reliance on *United States* v. *Maze*, 414 U.S. 395, to support his assertion that his conviction cannot stand because "there was no use of the mails for the purpose of executing the scheme" (Pet. 20) is misplaced. *Maze* held only that, after a scheme is brought to fruition and the benefits from it have already been received, subsequent mailings of sales slips that serve only to allocate the loss between the victims of a stolen credit card do not come within the reach of 18 U.S.C. 1341. As the mailings and use of the wires here occurred before the scheme was completed, *Maze* is inapposite (Pet. App. A-9).

4. Petitioner next contends (Pet. 22-25) that the government was improperly permitted to present certain evidence which was unduly prejudicial because it tended to establish that he had committed other crimes not charged in the indictment. However, the court of appeals correctly concluded that the trial court did not abuse its discretion in admitting the evidence because its probative value outweighed its prejudicial effect. (Pet. App. A-12 to A-19).

The testimony of Hintz, Beck, Held and Baker concerned petitioner's sizing up of the latter three individuals as prospective business partners, including the testimony of Held and Baker that petitioner had expressed a desire to insure their lives. Not only did petitioner not object to this testimony, but, as the court of appeals concluded (Pet. App. A-15 to A-16), it was not evidence of "other crimes" but evidence of the very crime for which petitioner was convicted. See, *e.g.*, *Reid* v. *United States*, 334 F.2d 915, 918 (C.A. 9). Petitioner's search for an appropriate victim was "analogous to the 'casing' of several banks before robbing the most suitable target" and was properly admitted as evidence of preparation and planning for the scheme charged in the indictment (Pet. App. A-16). See Fed. R. Evid. 404(b).

Walsh, a co-partner in the rotary engine partnership, testified that, following Null's murder, petitioner told the partners that he had twice previously been a beneficiary on insurance policies at a time when a partner (Jack Edwards) or employer (Schucardt) had been shot. The court of appeals correctly

concluded that the statements were not impermissibly admitted to prove the matter asserted, but that they were properly admitted as verbal acts done by petitioner in furtherance of the fraudulent scheme; petitioner may have been seeking either to "enlist the aid of the partners in an anticipated fight to recover the proceeds on the Null policies" or "to assuage any suspicions which might later arise and to cover up his role in Null's death" (Pet. App. A-16).

The testimony of six other witnesses (including that of Mr. and Mrs. Alsop) and the introduction of several exhibits pertained to the gunshot death of Jack Edwards (petitioner's partner in an earlier business venture) and the collection by petitioner of the $300,000 in insurance proceeds he received as a consequence of that death. The court of appeals correctly concluded (Pet. App. A-17 and n. 15) that such evidence was admissible on at least two separate grounds: it was relevant to the determination whether petitioner intended to defraud the insurance companies when he applied for and purchased the insurance on Null's life, and it also showed petitioner's motive for devising the scheme in the manner chosen. Evidence of other wrongful acts is admissible to show either intent or motive. Fed. R. Evid. 404(b); McCormick, *Evidence*, § 190 (2d ed. 1972). See also cases cited at Pet. App. A-18.

Moreover, both Mr. and Mrs. Alsop testified without objection that petitioner had stated that he had personally shot Edwards (Pet. App. A-17 and n. 14). In these circumstances, the prejudice that may

otherwise have flowed from the admission of any additional evidence on this subject "was minimal" (Pet. App. A-18). Petitioner was further protected from undue prejudice by the trial court's instruction that the jury was to consider the evidence only as it may bear on the issue of intent, and that the jury could consider it only "after it had concluded from independent evidence that the other elements of the offense had been proven" (Pet. App. A-18 to A-19).[10]

5. Petitioner argues (Pet. 25-27) that certain testimony by Mrs. Null (the widow of the deceased inventor) was inadmissible hearsay.

Mrs. Null testified that her husband had told her shortly before his death that he intended to speak to petitioner about cancelling the insurance and getting out of the partnership. Such testimony was therefore properly admitted, if relevant to an issue in the case (as the courts below found it was), under the "state of mind" exception to the hearsay rule. Fed. R. Evid. 803(3). As the court of appeals stated (Pet. App. A-21 to A-22):

> The evidence was admitted for the purpose of showing that it was likely that Null had in fact approached the defendant and sought to back out of the partnership and cancel the insurance; in other words, that he had acted in conformity with his expressed intentions. Whether he had so acted was a material fact since, if true, it

[10] The court had instructed the jury that the burden was on the government to prove that petitioner intended to defraud the insurance companies at the time when he had caused the use of the mails and wires (Tr. 2200-2202).

would establish the immediate motivation for the defendant's visit to Alsop. It would also corroborate Alsop's testimony that the defendant had stated that the shooting must be accomplished quickly because the victim "wanted to cancel the policies or get out." * * *

A declarant's out-of-court statement of intention is admissible to prove that the declarant subsequently acted in conformity with that intention, if the doing of that act is disputed material fact. *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892); Federal Rule of Evidence 803(3). *See also* McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 295 (2d ed. 1972) * * *.

6. Petitioner claims (Pet. 27-30) that publicity before and during trial deprived him of a fair trial.

As the court of appeals noted (Pet. App. A-6 to A-7 and n. 4), petitioner has neither alleged nor demonstrated how he was prejudiced. He points to no instance in which the news accounts were anything but factual or where a news account might have gone beyond the evidence presented to the jury. He did not request that the jury be sequestered and does not contend that the *voir dire* was inadequate. Nor does he suggest that any particular juror should have been discharged or that any juror violated the court's repeated admonitions to avoid all news accounts of the trial (Pet. App. A-6).

"Petitioner has failed to show that the setting of the trial was inherently prejudicial or that the jury selection process * * * permits an inference of actual

prejudice." *Murphy* v. *Florida*, 421 U.S. 794, 803. His unsupported and generalized allegation that "the trial atmosphere was saturated with the news media and reporters' intrusions" to such a degree that he could not have had a fair trial (Pet. 29-30) is insufficient to warrant overturning his conviction.[11]

7. Petitioner's final contention (Pet. 31-34) is that the 45-year sentence was excessive. He argues that, since he was convicted of only one scheme or course of conduct, the highest permissible sentence was the five-year maximum for violation of the mail or wire fraud statute.

Each separate use of the mails and interstate wire facilities, however, is a separate offense, notwithstanding that the defendant may have been engaged in a single fraudulent scheme. *Badders* v. *United States*, 240 U.S. 391, 394; *Henderson* v. *United States*, 425 F.2d 134, 138, n. 4 (C.A. 5). Petitioner was convicted on eleven counts of mail and wire fraud and on one count of conspiracy (which is a separate offense, see *Iannelli* v. *United States*, 420 U.S. 770, 777-778), each of which carries a maximum possible punishment of five years' imprisonment. His 45-year sentence was well within statutory limits. *United States* v. *Tucker*, 404 U.S. 443,

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[11] This case is unlike *Marshall* v. *United States*, 360 U.S. 310, 312, where jurors were shown to have been exposed "to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence."

447; *Dorszynski* v. *United States*, 418 U.S. 424, 431-432.[12]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1976.

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[12] The sentence reflects a consideration by the trial judge of the relevant factors. As the court of appeals noted (Pet. App. A-31), petitioner "stood convicted of a coldblooded scheme, involving the stalking and selecting of a victim with the intention of murdering him for the purpose of obtaining money." See *Williams* v. *Oklahoma*, 358 U.S. 576, 585-586 ("[T]he sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime," including the fact that the kidnapping victim was murdered). The facts of this case are thus fundamentally different from those in *United States* v. *Mackay*, 491 F.2d 616 (C.A. 10), cited by petitioner (Pet. 32), for there the crime revolved around a stock fraud and involved no violent acts.

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